(5)

No. 87-7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR and
McKINLEY and WILMA THURMAN - Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY and
SOUTH CENTRAL BELL TELEPHONE COMPANY - - - - - - - Respondents

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BRIEF OF LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

JOHN W. BILBY
KENDRICK R. RIGGS
MIDDLETON & REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
(502) 584-1135

Counsel for Respondent Louisville Gas and Electric Company

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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FREDRIC E. and ADRIAN MICHELS;
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McKINLEY and WILMA THURMAN - *Petitioners*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
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LOUISVILLE GAS & ELECTRIC COMPANY and
SOUTH CENTRAL BELL TELEPHONE COMPANY - - - - - *Respondents*

BRIEF OF LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Louisville Gas & Electric Company, by counsel, responds to the Petition for Writ of Certiorari to the Supreme Court of Kentucky and asks the Supreme Court of the United States to deny the Petition for the reasons now set forth.

COUNTERSTATEMENT OF THE CASE

In contrast to the statement of the case offered by the Petitioners, Louisville Gas and Electric Com-

pany ("LG&E") submits the facts of record are simple, clear and uncontradicted.

The Petitioners are four married couples. Each couple owns or owned a parcel of residential real estate. Each piece of real estate is subject to certain open and exclusive easements of record. Utility poles owned by LG&E or South Central Bell are located in these easements. Cables are attached to the utility poles which belong to LG&E and Bell and either one of the two community antenna television ("CATV") companies: Times Mirror Cable Television of Louisville ("Times Mirror") or Storer Cable Communications of Jefferson County ("Storer Communications"). (Collectively referred to as the "CATV Respondents.")

The Petitioners initiated a civil action against the Respondents, alleging that trespass was committed upon their property by the presence of the CATV distribution cables attached to the utility poles at the rear of their lots. The Petitioners do not object to the CATV cable running from those poles to their homes.

LG&E collects cable attachment charges from the CATV Respondents for use of the space on its poles, pursuant to LG&E's Cable Television Attachment Charges ("CATC") tariff. The CATC tariff is on file with and was approved by the Kentucky Public Service Commission. The charges for the attachment and the provisions for the right to make such an attachment are regulated by the Kentucky Public Service Commission. The attachments of cable to the poles are as a matter of law in Kentucky a "service" un-

der Chapter 278 of the Kentucky Revised Statutes. *See Kentucky CATV Association* v. *Volz,* 675 S. W. 2d 393, 396 (Ky. App. 1983).

The record below contains substantial evidence that the Petitioners, three of whom are lawyers, have expressly and impliedly given their consent to the presence of CATV cable on their property. The testimony and conduct of the Petitioners clearly establishes their respective grants of consent.

For example, the Michels, Kleins, Receveurs and Thurmans are subscribers of either Times Mirror or Storer Communications cable services. In exchange for monthly payments, they each receive CATV service.

In addition, the Michels, Kleins, Receveurs and Thurmans each signed written agreements to subscribe to the CATV service. The written agreements are evidence of the consent for the CATV Respondents to install the necessary cables to provide service to the Petitioners' homes.

Significantly, the Michels, Kleins, Receveurs and Thurmans do *not* object to the presence of CATV cable running between the poles and their homes, known as a "drop line."

Finally, the Michels, Kleins, Receveurs and Thurmans have not discontinued their CATV service since their complaint was filed with the Jefferson Circuit Court in Louisville, Kentucky.

After more than a year of discovery, all the parties to this action moved for summary judgment, including

the Petitioners. The Jefferson Circuit Court then made the following findings of fact with respect to each of the Petitioners:

(a) *Michels:*

The Michels claim the trespass occurred on their private-residential property located at 3117 Dell Brooke. The residence was purchased in 1976 and has since been sold. The Michels were subscribers to cable television, and permitted Times-Mirror employees to come on their property to install equipment for cable television services. *They signed an agreement with Times-Mirror as part of their application for service. That agreement authorized free access to the premises for installation and service of equipment.* The only cable equipment on their property was the dropline connecting the service to the residence and the aerial coaxial cable hung within a public utility easement. *The Michels have demonstrated no diminished use of their real property and no injury to tree limbs or shrubs done by Times-Mirror.* [Emphasis added].

(b) *Kleins.*

The Kleins claim the trespass occurs continually at their present residence on Woodfill Way. The Kleins were subscribers to cable television previously and continued subscription to cable television at Woodfill Way. *Like the Michels, the Kleins are cable subscribers who have signed an agreement with Times-Mirror permitting access for installation and maintenance of cable equipment.* They also have not contested the dropline that links their residence to the aerial coaxial cable that

is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. *In fact, the Kleins do not want the cable removed and plan to continue cable television services.* They have demonstrated no injury to their realty or its use by the presence of the cable. [Emphasis added].

(c) *Receveurs:*

The Receveurs claim the trespass occurs continually at their residence at 11 Narwood Drive. The Receveurs were subscribers to cable television, and permitted Storer employees to come on their property to install equipment for cable television services. *The Receveurs are presently cable subscribers who have signed an agreement with Storer permitting access to the premises for installation and service of equipment. The Receveurs do not want the cable removed and plan to continue to receive cable television services.* They do not contest the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. The Receveurs have demonstrated no diminished use of their real property and no injury to their realty, tree limbs or shrubs done by Storer. [Emphasis added].

(d) *Thurmans:*

The Thurmans claim the tresspass occurs continuously at their present residence at 6207 Bay Pine Drive. *The Thurmans were subscribers to cable*

television and like the Receveurs, have signed an agreement with Storer permitting access for installation and maintenance of cable equipment. They have not contested the dropline that links the residence to the aerial coaxial cable nor do they have any objections to the aerial coaxial cable because they admit it is necessary for them to receive cable television services. They claim trespass on land by a down guy and anchor placed within a public utility easement on their property and seek compensatory damages, not injunctive relief. *The Thurmans do not wish to have cable television removed from their home and plan to continue to receive cable television services.* They have demonstrated no injury to their realty or its use by the presence of the Storer down guy and anchor.[1] [Emphasis added].

Having made the foregoing findings of fact, the trial court concluded:

> To prevail on the merits, the Plaintiffs must demonstrate a trespass to their private real property and injury to the property's use or value.
>
> The Michels no longer live at 3117 Dell Brooke. There was no demonstrated injury to their property by the presence of the cable. There is no continuing trespass as the couple no longer resides at the location. Their claim is rendered moot and therefore unable to be sustained in this action.
>
> The claims of continuing trespass by the Kleins, the Receveurs, and the Thurmans are likewise unable to stand on the merits. . . . Implied consent may be found as a matter of law where habitual

[1]See Appendix A to Brief.

> use of property for a particular purpose existed with the knowledge of the owner and without the owner's objection . . . There has clearly been a habitual and obvious use of the public utility easements over the property of the Kleins, the Receveurs and the Thurmans, by Times-Mirror cable or by Storer cable and equipment without objection by the Kleins or by the Receveurs or Thurmans other than the present action. In addition, the undisputed subscriber agreements signed by the Kleins, the Receveurs, and the Thurmans, and their desire to continue subscriber services logically give rise to the implication of consent to the coaxial cable and cable television equipment which enables the provision of subscriber services to the Kleins, the Receveurs, and the Thurmans. Where the Kleins, the Receveurs and the Thurmans, have, by implication, consented and continued to consent to the presence of the cable, their claim cannot be sustained in this action.
>
> As none of the plaintiffs, including the Michels, the Kleins, the Receveurs, and the Thurmans, have standing to continue their respective claims against Times-Mirror or against Storer for trespass, so must *their derivative claims against the co-Defendants, Louisville Gas & Electric Company and South Central Bell Telephone Company, fail on the merits.*[2] [Emphasis added].

The trial court then granted summary judgment and dismissed the claims of the Petitioners.

On appeal, the Court of Appeals for Kentucky declined to review the trial court's rationale for finding

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[2]See Appendix A to Brief.

consent on the part of the Petitioners, but affirmed its judgment. Instead, the Court of Appeals for Kentucky held that the easements crossing Petitioners' properties were susceptible to apportionment to CATV usage. *Michels* v. *Times Mirror Cable Television of Louisville, Inc.,* No. 85-CA-1081, Slip Opinion, pp. 3-4 (Ky. App., Jan. 31, 1986).[3]

Petitioners filed a Motion for Discretionary Review with the Kentucky Supreme Court which was granted. Like the Court of Appeals of Kentucky, the Supreme Court of Kentucky affirmed the judgment of the trial court, but for a different reason than that given by the Court of Appeals of Kentucky. The Kentucky Supreme Court held:

> We think it is clear that the movants had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

Michels v. *Times Mirror Cable Television of Louisville, Inc.* No. 86-SC-123-DG, Memorandum Opinion (Ky., Jan. 22, 1987).[4] The Kentucky Supreme Court declined to review the issue of apportionment of the ease-

[3]See Appendix B to Brief.

[4]See Appendix C to Brief.

ments, but affirmed the judgment of the trial court. The Petitioners then filed a petition for rehearing and or modification and extension of opinion with the Kentucky Supreme Court. It was denied.

REASONS FOR DENYING THE WRIT

1. The Petition Fails To State A Substantial Federal Question.

The Petition fails to state a substantial federal question. The Court therefore lacks jurisdiction to grant the writ of certiorari. 28 U.S.C. § 1257.

The judgment of the trial court and the decision of the Kentucky Supreme Court to affirm the trial court's judgment do not raise substantial federal questions. The Petitioners filed a complaint alleging that a trespass occurred through the actions of the Respondents. The Respondents raised the defense of consent. The trial court found the Petitioners had consented to the presence of CATV cable and granted judgment in favor of the Respondents. The Kentucky Supreme Court affirmed the judgment of the trial court on the grounds of consent and the general principles of estoppel.

In previous decisions, this Court has declined to review similar decisions by state courts on the grounds that an estoppel under state law does not present a federal question. *Adams County* v. *Burlington and Missouri River Railroad Co.,* 112 U. S. 123 (1884). The decision by the Kentucky Supreme Court is local in nature, involving issues of trespass, consent and estoppel and does not present a substantial federal

question. This Court has long held that it will not review state court judgments where such judgments rest on adequate state grounds. *Hammerstein* v. *Superior Court of California,* 340 U. S. 622 (1951).

The Court should deny the Petition on the ground that it fails to raise a substantial federal question.

2. The Kentucky Courts Have Correctly Affirmed The Judgment Of The Trial Court; No "Taking" Under The Fifth Amendment Has Occurred.

The Petition has raised the argument of a lack of consent once again. This argument was extensively briefed before the Jefferson Circuit Court, the Kentucky Court of Appeals, the Supreme Court of Kentucky and now this Honorable Court. While Petitioners are perhaps disappointed at the resolution of the issue of consent by all three of the Kentucky courts which have found consent, those Kentucky courts clearly did not misconceive this issue. The Supreme Court of Kentucky has ruled and the trial court has found that the evidence is clear that the Petitioners consented to the entry by the CATV companies.

If the Petitioners held any right to object to the presence of CATV cable before they signed the written subscription agreements (and they did not), the Michels, the Kleins, the Receveurs and the Thurmans subsequently waived their objections and are now estopped to claim otherwise. Indeed, the arguments of counsel for the Petitioners contradicts the testimony and actions of the Michels, the Kleins, the Receveurs and the Thurmans.

Having signed the cable subscription agreements to receive CATV service, the Petitioners waived any objections to the presence of the coaxial cable. The Petitioners received and today continue to receive the benefits of cable television in exchange for monthly payments. Under these circumstances, the Kentucky courts have repeatedly upheld the invocation and application of the doctrine of estoppel where, as here, the party denying the estoppel seeks to maintain a position inconsistent with his acquiescence or acceptance of a benefit. *See, PV&K Coal Co.* v. *Kelly,* 191 S. W. 2d 231, 234 (Ky. 1945). The Petitioners accepted and continue to accept the benefits of cable television service, but also claim damages because of the presence of the CATV cable.

Moreover, the Petitioner's argument of lack of consent squarely contradicts the fundamental rule recognized by the Kentucky court in *Martin* v. *Gayheart,* 264 S. W. 2d 653, 654 (Ky. 1954):

> It is a rule of general application in all jurisdictions that one who stands by and sees another enter upon land under a claim of right and permits the entrant to make expenditures or improvements under circumstances which would call for notice or protest cannot afterward assert his own title against such person.

Applying this well founded principle, the Petitioners, assuming they had "rights" upon which to raise objections, should have objected. Instead, they chose to contract with the CATV Respondents and recieve the

provision of CATV service. They now cannot claim trespass.

The argument by Petitioners that they were somehow misled into consenting to the presence of CATV cable is without merit. The specious nature of this argument was addressed in *Blackburn* v. *Piney Oil & Gas Co.*, 128 S. W. 2d 192 (Ky. 1939). In *Blackburn, supra,* an oil company moved a drilling rig onto a portion of the plaintiff's garden. The plaintiff made no objection until 15 months after the well was completed. Suit was filed and the oil company raised the defense of estoppel. There, as here, the plaintiff argued on appeal that:

> he made no objection at the time to the drilling of the well because he was ignorant of his rights under the mineral deed, and that the [oil company] was acquainted with [his rights in the garden property].

Id. at p. 194.

The trial court, upon the taking of proof, found that the plaintiff "knew this well was located in the garden, or at least he had constructive knowledge thereof, and his action in permitting the defendant Oil Company to drill this well without objection and without asserting any claim to the minerals under his garden estopped him from now claiming the well." *Id.* On appeal, the Kentucky Court of Appeals, then the highest court of review, held:

> This deed was of record and being in plaintiff's chain of title, he is presumed to have knowledge of

> what it contained. It is argued by plaintiff that the oil Company likewise had constructive knowledge of the exception in the deed, therefore, it had notice it could not drill on this spot. But when plaintiff consented for the Oil Company to drill on this location it was justified in thinking plaintiff had waived the exception in the mineral deed. *Appellant cites us many cases to the effect that a person who is ignorant of a situation whereon he should have acted, is not estopped by his failure to act.* Typical of the cases he cites is Shaw v. Farmers' Bank & Trust Company, 235 Ky. 502, 31 S.W. 2d 893, wherein it was held a lienholder was not estopped to assert his lien because he did not announce same at an auction sale of the property, it not being proven he heard the auctioneer announce that the property would be sold free of encumbrance. Obviously, a man would not be called on to assert his lien when he did not hear the announcement that the property would be sold free of encumbrance. *The Shaw and similar cases have no bearing on the question that plaintiff after permitting a well to be drilled in his garden can deny he is estopped from claiming the well fifteen months later because he did not know he had a right to object to it being drilled.*

Id. at p. 195. (Emphasis added; citations omitted in part).

Likewise, the Petitioners cannot deny that they are estopped from claiming the CATV cable is a form of trespass years after the CATV cable was installed because they somehow did not know they had a right to object to it being installed.

Petitioners are no different than the dissatisfied plaintiff in *Blackburn, supra.* They gave their consent based on the facts which they knew then and are no different today.

Petitioners had full knowledge of the *fact* that CATV cable was being installed in the easements of record and are certainly aware today of the presence of the CATV dropline to which they have no objection. To argue as Petitioners do that they have been somehow duped, as lawyers, is inconsistent with their actions, unsupported by the evidence of record and simply untenable. The Kentucky Supreme Court correctly determined that Petitioners' actions preclude their action for trespass.

Furthermore, Petitioners' reliance on *Satin* v. *Hialeah Race Course,* 65 S. 2d 475 (Fla. 1953) is misplaced for two reasons. LG&E did not license the use of the easements to the CATV companies. The Kentucky courts have held that LG&E provides a "service" in the form of the provision of "cable attachments" to the CATV companies. *See Kentucky CATV Association* v. *Volz,* 675 S. W. 2d 393, 396 (Ky. App. 1983). *See also* KRS 278.030(2); KRS 278.170(1); and 807 KAR 5:006 §17 "Cable Television Pole Attachment . . . Regulation."

Secondly, the Petitioners at bar, unlike the Hialeah Race Course, consented to the presence of the CATV companies. If Hialeah Race Course had consented to the use of the press pass by Mrs. Satin, then Hialeah Race Course could not raise the defense of Mrs. Satin's trespass to establish the proper duty or standard of

care. Hialeah Race Course, however, did not consent to the use of the press pass by Mrs. Satin and, therefore, correctly claimed that her entry was unauthorized.

Finally, Petitioners' argument that they did not waive their "right to protect their property under the Fifth Amendment of the United States Constitution" is without merit. As this Court held in *West* v. *Chesapeake & Potomac Telephone Company,* 295 U. S. 662, 671 (1935), "neither Nation nor State may require the use of privately owned property without just compensation." Neither the Commonwealth of Kentucky nor the federal government (or any other governmental agency or entity) is a party to this litigation. "The just compensation and due process clauses are triggered only by governmental action." *New York, N. H. & H. R. Co., 1st Mtg. 4% B.C.* v. *United States,* 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969). The conduct of which Petitioners complain is solely between private individuals and companies. There has been no governmental action, "taking" or otherwise, in this case. Therefore, Petitioners cannot transform an alleged "trespass" into a "taking" under the Fifth Amendment without some action by the federal, state or local government. In short, the Fifth Amendment considerations do not apply to a simple trespass case between private parties.

In sum, the foregoing demonstrates the sound reasoning and analysis by the Supreme Court of Kentucky in holding "that the general principles of estoppel apply here and that [Petitioners] are now estopped to contest respondent's use of the easement." *Michels* v.

Times Mirror Cable Television of Louisville, No. 86-SC-123-DG, Memorandum Opinion, p. 4 (Ky., Jan. 22, 1987).

3. The Exclusive Easements Are Apportionable For The Uses For Which The Easements Were Dedicated.

The courts across the nation have reached the same conclusion as the Kentucky Court of Appeals that CATV cables are facilities which are contemplated by public utility easements.

In *Jolliff* v. *Hardin Cable Television Co.,* 269 N. E. 2d 588 (Ohio 1971), the Ohio Court held that easements for electric and telephone utilities included the right to attach CATV lines to the utility poles in the easements, since such attachments imposed no greater burden than an additional line installed by the electric company. That logic applies here. The Petitioners amended their complaint three times before they accurately described the cable installed by the CATV companies on the poles in the easements. They were unable to locate the CATV wire among the telephone and electric wires on the poles! They can hardly complain that their burden was increased, when they could not even identify the cable in their pleadings.

In *White* v. *City of Ann Arbor,* 281 N. W. 2d 283 (Mich. 1979), the Michigan Court concluded that public utility easements included CATV service since that service was of a similar nature to other conventional utility services. No action for trespass was allowed because of attachment of CATV cables to utility poles in existing utility easements.

In *Hoffman* v. *Capitol Cablevision System, Inc.*, 383 N.Y.S. 2d 674 (N.Y. App. Div. 1976), the Court found that an easement for the distribution of electricity and messages was broad enough to include cable television, and ruled that the easement was exclusive to the utility companies, so it could be apportioned, allowing cable TV to be installed. *See Crowley* v. *New York Telephone Co.*, 363 N.Y.S. 2d 292 (N.Y. Dist. Ct. 1975); *Clark* v. *El Paso Cablevision, Inc.*, 475 S. W. 2d 575 (Tex. 1971).

In *Salvaty* v. *Falcon Cable Television*, 212 Cal. Rptr. 31 (Cal. App. 2 Dist. 1985), the Court likewise considered the question of whether CATV cable attached to surplus space on a utility pole was within the scope of an easement at the rear of residential property "for the stringing of telephone and electric light and power wires." The Court recognized that although CATV did not exist at the time of the granting of the easement, it is part of the natural evolution of communication technology and was thus consistent with the primary goal of the easement, to provide for wire transmission of power and communication. The Court also stated that it could not see how the addition of CATV to a pre-existing utility pole materially increased the burden on the appellants' property.

The *Salvaty* Court analyzed the case as turning on apportionability of the easement, following the rationale of the *Hoffman* case.

> Similarly here, the easement is exclusive vis-a-vis appellants, who clearly have no interest in providing utility services, and cannot interfere with the

> easement owner's facilities. *See, e.g., City of Los Angeles* v. *Igna* (1962) 208 Cal. App. 2d 338, 341, 25 Cal. Rptr. 247). "Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable." (5 Rest., Property, § 493, subd. [c], p. 3054.)
>
> In holding that the easement could properly be apportioned to the cable company, the *Hoffman* court was further influenced by the fact that the cable equipment would not impose an additional burden on the servient tenement; was consistent with the policy of broadly interpreting easements to meet progressive inventions; and that cable television rendered a valuable education and public service.

Id. at p. 35.

The California Court held that the property owners' consent was not required to install the television cable.

In *Henley* v. *Continental Cablevision,* 692 S. W. 2d 825 (Mo. App. 1985), the Missouri Court of Appeals considered an action by residential property owners to have CATV cables removed from utility poles located in utility easements at the rear of their property. The Court found that the easements were easements in gross because their use was not granted to a person who owned adjacent land. The easements were found to be exclusive because the servient owners did not

retain the right to share the use of the poles. Since they were exclusive, the easements were apportionable. The Court's logic is irrefutable:

> We believe the very nature of the 1922 easements obtained by both utilities indicates that they were intended to be exclusive and therefore apportionable. It is well settled that where the servient owner retains the privilege of sharing the benefit conferred by the easement, it is said to be "common" or non-exclusive and therefore not subject to apportionment by the easement owner. *Conversely, if the rights granted are exclusive of the servient owners' participation therein, divided utilization of the rights granted are presumptively allowable. This principle stems from the concept that one who grants to another the right to use the grantor's land in a particular manner for a specified purpose but who retains no interest in exercising a similar right himself, sustains no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others.* On the other hand, if the grantor intends to participate in the use or privilege granted, then his retained right may be diminished if the grantee shares his right with others. Thus, insofar as it relates to the apportionability of an easement in gross, the term "exclusive" refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted, not to the number of different easements in and over the same land.
>
> Here, there is no claim that plaintiffs' predecessors had at the time the easements were granted, any intention to seek authority for, or any interest

> whatsoever in using the five foot strips for the construction and maintenance of either an electric power system or telephone and telegraphic service. Moreover, at no time during the ensuing sixty-three years have the trustees been authorized to furnish such services by any certificate of convenience and necessity issued by the Public Service Commission pursuant to §§ 392.260 and 393.170, RSMo. 1978. Accordingly, the easements granted to Southwestern Bell and Union Electric were exclusive as to the grantors thereof and therefore apportionable.

692 S. W. 2d at pp. 827-828 (emphasis added; citations omitted in part).

The foregoing logic applies here. The easements are not "appurtenant" to other real property. The utility easements allow the utilities to construct poles and attach wires. The property owners retain no such right. The easements are, therefore, for the exclusive use of the utility companies. As exclusive easements, the utilities have the right to apportion those easements, and permit attachment of CATV lines. The Kentucky Court of Appeals correctly decided that the easements in this case were apportionable.

Finally, Petitioners' reliance on *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419 (1982) is misplaced. Unlike the present appeal, there was no easement of any kind involved in *Loretto.* Here, easements of record exist; the CATV cable equipment is within the scope of these easements. The easements are apportionable for the use and occupation of CATV cable.

4. The Occupation And Use Of The Easements By CATV Cable Is Similar In Nature And Purpose To The Occupation And Use Of The Easements By The Other Utilities.

The occupation and use of the easements by CATV is similar in nature and purpose to the occupation and use of the easements by the other utilities. These exclusive easements, therefore, are apportionable. *See, e.g. Henley* v. *Continental Cablevision,* 692 S. W. 2d 825 (Mo. App. 1985).

The issue for determining whether the exclusive easements are apportionable is the similarity of the occupation and use of the easements by the CATV operators not whether CATV operators are statutorily defined "utilities."

In *City of Owensboro* v. *Top Vision Cable Co. of Ky.,* 487 S. W. 2d 283 (Ky. 1973), *cert. denied,* 411 U. S. 948 (1973), the Kentucky Court of Appeals, then the highest state court of review, considered whether a city could require a CATV company whose lines attached to utility poles in utility easements, to be subject to a city utility franchise. The Kentucky Court held:

> It cannot be denied that television is an integral part of American life. It possesses many of the attributes of a public utility. It is of a public nature.

Id. at p. 287.

In sum, although the CATV respondents are not jurisdictional "utilities" as defined in KRS 278.010(3)

for purposes of regulation by the Kentucky Public Service Commission, the Kentucky courts have recognized that CATV operators and the service they provide have the "attributes of a public utility." *Id.* The CATV cable has the attributes of cable strung by South Central Bell and LG&E. The CATV cable occupies and uses the easements in a similar, if not identical, manner as the cable of LG&E and SCB.

Further, in *Cumberland Telephone and Telegraph Co.* v. *Avritt,* 85 S. W. 204 (Ky. 1905), the Kentucky Court observed that evolution in technology required the use of the easements by methods of communication not envisioned at the time of the original easement:

> The transmission of messages by telephone is a business of a public character, which is conducted under public control in the same manner as the carriage of persons or property. The easement of the public is not limited to the particular methods of use in vogue when the easement is acquired, but includes improved methods which the progress of society finds necessary for business.

Id. at p. 204. Thus the Kentucky Court of Appeals recognized the necessity of viewing easements in keeping with the evolution of technology in 1905. The same is true today.

In sum, the Kentucky courts have correctly addressed this issue twice and have articulated a public policy which recognizes the need to construe easements to permit new technology and services for societal purposes.

CONCLUSION

For the reasons set forth above, Louisville Gas and Electric Company requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN W. BILBY
KENDRICK R. RIGGS
MIDDLETON & REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
(502) 584-1135

Counsel for Respondent
Louisville Gas and Electric Company

CERTIFICATE

It is hereby certified that, on this 28th day of July, 1987, three copies of the within Brief in Opposition of Louisville Gas and Electric Company were served by United States mail, postage prepaid, on Nicholas W. Carlin, Esq., 911 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioners; Laurence J. Zielke, Esq. and Michael W. Lowe, Esq., Pedley, Ross, Zielke & Gordinier, 450 South 3rd Street, Louisville, Kentucky 40202, Counsel for Storer Communications of Jefferson County, Inc.; Marvin J. Hirn, Esq., and John Selent, Esq., 2450 Meidinger Tower, Louisville, Kentucky 40202, Counsel for Times Mirror Cable Television of Louisville, Inc.; James G. Harralson, Esq., Solicitor, South Central Bell Telephone Company, 601 West Chestnut Street, P. O. Box 32410, Louisville, Kentucky 40232, Counsel for South Central Bell Telephone Company.

JOHN W. BILBY

Counsel for Respondent, Louisville Gas and Electric Company

APPENDIX

APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

No. 83 CI 07641

FREDRIC E. MICHELS, Et Al. - - - *Plaintiffs*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - - - *Defendants*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case is presently before the Court on the plaintiff's complaint against multiple defendants. The plaintiff's claim that the aerial coaxial cable installed within public utility easements on their private property is a continuing trespass to real property justifying compensatory and punitive damages.

~~The Michels~~ claim the trespass occurred on their private-residential property located at 3117 Dell Brooke. The residence was purchased in 1976 and has since been sold. The Michels were subscribers to cable television, and permitted Times-Mirror employees to come on their property to install equipment for cable television services. They signed an agreement with Times-Mirror as part of their application for service. That agreement authorized free access to the premises for installation and service of equipment. The only cable equipment on their property was the dropline connecting the service to the residence and the aerial coaxial cable hung within a public utility easement. The Michels have demonstrated no diminished use of their

real property and no injury to tree limbs or shrubs done by Times-Mirror.

The Kleins claim the trespass occurs continually at their present residence on Woodfill Way. The Kleins were subscribers to cable television previously and continued subscription to cable television at Woodfill Way. Like the Michels, the Kleins are cable subscribers who have signed an agreement with Times-Mirror permitting access for installation and maintenance of cable equipment. They also have not contested the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. In fact, the Kleins do not want the cable removed and plan to continue cable television services. They have demonstrated no injury to their realty or its use by the presence of the cable.

CONCLUSIONS OF LAW

To prevail on the merits, the plaintiffs must demonstrate a trespass to their private real property and injury to the property's use or value.

The Michels no longer live at 3117 Dell Brooke. There was no demonstrated injury to their property by the presence of the cable. There is no continuing trespass as the couple no longer reside at the location. Their claim is rendered moot and therefore unable to be sustained in this action.

The Kleins' claim of continuing trespass is likewise unable to stand on the merits. The law in Kentucky is that "[a] trespasser is a person who enters or remains upon the land in the possession of another without the possessor's consent." *Bradford* v. *Clifton*, 379 S. W. 2d 249, 250 (Ky. 1964). Further, consent need not be explicit but can be implied by the circumstances. Implied consent may be

found as a matter of law where habitual use of property for a particular purpose existed with the knowledge of the owner and without the owner's objection. *Id.* There has clearly been a habitual and obvious use of the public utility easement by the Times-Mirror cable without objection by the Kleins other than the present action. In addition, the undisputed subscriber agreement and desire to continue subscriber services logically give rise to the implication of consent to the coaxial cable which enables the provision of subscriber services to the Kleins. Where the Kleins have, by implication, consented and continue to consent to the presence of the cable, their claim can not be sustained in this action.

As neither the Michels or Kleins have standing to continue their respective claims against Times-Mirror for trespass, so must their derivative claims against the co-defendants fail on the merits.

ORDER

This matter comes before the Court on the multiple defendants' motions for summary judgment, pursuant to CR 56. As there is no genuine issue of material fact as regards either plaintiff, the Court grants summary judgment as a matter of law and hereby orders the claims of both plaintiffs dismissed.

(s) Olga S. Peers
Olga S. Peers, Judge

Date: 2/19/85

cc: All Counsel

Entered in Court: February 19, 1985

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

No. 83 CI 07641

FREDRIC E. MICHELS, Et Al. - - - - *Plaintiffs*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - - - *Defendants*

AMENDED ORDER

The Court having entered an Order granting summary judgment and ordering the claims of both plaintiffs dismissed in the above action on this date, now amends that Order by inserting a final paragraph to read as follows:

"This is a final and appealable Order."

(s) Olga S. Peers
Olga S. Peers, Judge

Date: 2/19/85

cc: All Counsel

Entered in Court: February 19, 1985

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

No. 83 CI 07641

FREDRIC MICHELS, Et Al. - - - - *Plaintiffs*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - - - *Defendants*

SECOND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Court having entered an Order granting summary judgment and ordering the claims of the Plaintiffs Michels and Kleins dismissed in the above action, and having amended said Order, all on the 19th day of February, 1985, and the Court now desiring to amend its Order to finally clarify its judgment and intent, now issues the following Second Amended Findings of Fact, Conclusions of Law, and Order.

This case is presently before the Court on the Plaintiffs' Complaint against multiple Defendants. The Plaintiffs claim that the aerial coaxial cable installed within public utility easements on their private property is a continuing trespass to real property justifying compensatory and punitive damages.

The Michels claim the trespass occurred on their private-residential property located at 3117 Dell Brooke. The residence was purchased in 1976 and has since been sold. The Michels were subscribers to cable television, and permitted Times-Mirror employees to come on their property to install equipment for cable television services. They

signed an agreement with Times-Mirror as part of their application for service. That agreement authorized free access to the premises for installation and service of equipment. The only cable equipment on their property was the dropline connecting the service to the residence and the aerial coaxial cable hung within a public utility easement. The Michels have demonstrated no diminished use of their real property and no injury to tree limbs or shrubs done by Times-Mirror.

The Kleins claim the trespass occurs continually at their present residence on Woodfill Way. The Kleins were subscribers to cable television previously and continued subscription to cable television at Woodfill Way. Like the Michels, the Kleins are cable subscribers who have signed an agreement with Times-Mirror permitting access for installation and maintenance of cable equipment. They also have not contested the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, no injunctive relief. In fact, the Kleins do not want the cable removed and plan to continue cable television services. They have demonstrated no injury to the realty or its use by the presence of the cable. The Receveurs claim the trespass occurs continually at their residence at 11 Narwood Drive. The Receveurs were subscribers to cable television, and permitted Storer employees to come on their property to install equipment for cable television services. The Receveurs are presently cable subscribers who have signed an agreement with Storer permitting access to the premises for installation and service of equipment. The Receveurs do not want the cable removed and plan to continue to receive cable television services. They do not contest the dropline that links their residence to the aerial coaxial cable that is hung within a public utility easement

on their property. They claim trespass on land by the aerial coaxial cable and seek compensatory damages, not injunctive relief. The Receveurs have demonstrated no diminished use of their real property and no injury to their realty, tree limbs or shrubs done by Storer.

The Thurmans claim the trespass occurs continuously at their present residence at 6207 Bay Pine Drive. The Thurmans were subscribers to cable television and like the Receveurs, have signed an agreement with Storer permitting access for installation and maintenance of cable equipment. They have not contested the dropline that links the residence to the aerial coaxial cable nor do they have any objections to the aerial coaxial cable because they admit it is necessary for them to receive cable television services. They claim trespass on land by a down guy and anchor placed within a public utility easement on their property and seek compensatory damages, not injunctive relief. The Thurmans do not wish to have cable television removed from their home and plan to continue to receive cable television services. They have demonstrated no injury to their realty or its use by the presence of the Storer down guy and anchor.

CONCLUSIONS OF LAW

To prevail on the merits, the Plaintiffs must demonstrate a trespass to their private real property and injury to the property's use or value.

The Michels no longer live at 3117 Dell Brooke. There was no demonstrated injury to their property by the presence of the cable. There is no continuing trespass as the couple no longer reside at the location. Their claim is rendered moot and therefore unable to be sustained in this action.

The claims of continuing trespass by the Kleins, the Receveurs, and the Thurmans are likewise unable to stand

on the merits. The law in Kentucky is that "[a] trespasser is a person who enters or remains upon the land in the possession of another without the possessor's consent." *Bradford* v. *Clifton,* 379 S. W. 2d 249, 250 (Ky. 1964). Further, consent need not be explicit but can be implied by the circumstances. Implied consent may be found as a matter of law where habitual use of property for a particular purpose existed with the knowledge of the owner and without the owner's objection. *Id.* There has clearly been a habitual and obvious use of the public utility easements over the property of the Kleins, the Receveurs, and the Thurmans, by Times-Mirror cable or by Storer cable and equipment without objection by the Kleins or by the Receveurs or Thurmans other than the present action. In addition, the undisputed subscriber agreements signed by the Kleins, the Receveurs, and the Thurmans, and their desire to continue subscriber services logically give rise to the implication of consent to the coaxial cable and cable television equipment which enables the provision of subscriber services to the Kleins, the Receveurs, and the Thurmans. Where the Kleins, the Receveurs, and the Thurmans, have, by implication, consented and continued to consent to the presence of the cable, their claim cannot be sustained in this action.

As none of the Plaintiffs, including the Michels, the Kleins, the Receveurs, and the Thurmans, have standing to continue their respective claims against Times-Mirror or against Storer for trespass, so must their derivative claims against the co-Defendants, Louisville Gas & Electric Company and South Central Bell Telephone Company, fail on the merits.

ORDER

This matter comes before the Court on the multiple Defendants' motions for summary judgment, pursuant to

Civil Rule 56. As there is no genuine issue of material fact as regards any of the Plaintiffs, the Court grants summary judgment as a matter of law and hereby orders the claims of all Plaintiffs dismissed.

This is a final and appealable Order.

(s) Olga S. Peers
Olga S. Peers, Judge

Date Entered: February 25, 1985

cc: All Counsel

APPENDIX B

COURT OF APPEALS OF KENTUCKY

OPINION RENDERED: JANUARY 31, 1986; 3:00 P.M.
TO BE PUBLISHED

No. 85-CA-1081-MR

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR; and
McKINLEY and WILMA THURMAN - - *Appellants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - *Appellees*

Appeal From Jefferson Circuit Court
Honorable Olga Peers, Judge
Action No. 83-CI-07641

AFFIRMING

BEFORE: HOWARD, LESTER and MILLER, Judges.

MILLER, JUDGE. Appellants are residence owners in Jefferson County, Kentucky. Appellees are two cable television companies and two utility companies. The question arises whether cablevision companies, relatively new enterprises, may string their coaxial cables along and across lands by way of traditional utility easements. The use is made with the consent of the other users of the easement—

Louisville Gas and Electric Company and South Central Bell Telephone Company. The question is of considerable significance as many of the utility easements predate the advent of community antenna television (CATV). It is therefore arguable the use of the easement in furtherance of the CATV enterprise, a function not contemplated when the easement was established, is impermissible and consequently a trespass against the owner of the servient estate.

The easements in question, appearing in subdivision plats and deeds of dedication, are as follow:

> The Michels easement reads, "the spaces outlined by dotted lines and marked electric and telephone easements or street lighting easements are hereby reserved for easements for electric and telephone utility purposes. . . .
>
> The Receveur easement reads, "An easement for public utility purposes is hereby reserved on, over, under and within the strips and spaces upon this plan defined and bounded by broken lines and marked 'public utility easement' including the right of the utility companies to remove and trim trees on said easement. . . ."
>
> The Thurman easement reads, "The spaces outlined by dashed lines and marked 'electric and telephone easement' are hereby reserved as easements for electric and telephone utility purposes, which include: (1) . . . ."
>
> The Klein easement reads, ". . . five foot easement is retained across the rear of each lot for public utility purposes."

Appellants filed their action in trespass and sought to certify as a class all residents of Louisville and Jefferson County similarly situated. CR 23. On defendants' motion, the trial court granted summary judgment before addressing the class action issue. In defense of appellants' claim,

the appellee CATV companies maintained they were entitled to apportioned use of the easement. They variously interposed the defenses of consent, waiver and estoppel based on language in the service contract each subscriber of cable television was required to sign. At least one appellee contended federal law preempted the field and that utility easements, in the nature of those in question, are subjected to CATV usage. U. S. Const., article VI, clause 2; and 47 U.S.C. 541. While we do not find it necessary to address this contention, it is of significant interest and may require determination were the easements not of the type under consideration.

All appellants have subscribed to cable television at one time or another in the past, and at least one appellant indicated he would continue to subscribe to cable television whatever the outcome of this litigation. The trial court's summary judgment was based upon a finding that appellants had impliedly consented to the installation of the aerial coaxial cable. The trial court found consent from the failure of appellants to contest the dropline which runs from the coaxial cable to their respective residences coupled with the agreement each had signed with the cable companies granting its employees free access to their property to install and service cable equipment. The court also ruled that appellants had not demonstrated that they had been injured. We decline to review the soundness of the trial court's rationale for granting summary judgment, but nevertheless affirm the decision under the rule which compels us to do so when the proper result has been reached. *See Kessee* v. *Smith,* 289 Ky. 609, 159 S. W. 2d 56 (1941). It is our view that the easements in question are susceptible to apportionment to CATV usage. This is true notwithstanding some of the easements identify particular utilities such as telephone and electricity. They are standard easements found throughout this Commonwealth incident to

subdivision development. They are not easements appurtenant (*see Buck Creek R.R. Co.* v. *Haws,* 253 Ky. 203, 69 S. W. 2d 333 [1934]), but are in gross because the benefit of the easement does not inure to any specific real property owned by either appellee utility company. *See Inter-County Rural Elec. Coop. Corp.* v. *Reeves,* 294 Ky. 458, 171 S. W. 2d 978 (1943). As easements in gross, we believe they are particularly susceptible to apportionment and consequently available for the use of utilities in general. The CATV industry is a business of public nature having many of the attributes of public utilities. See *City of Owensboro* v. *Top Vision Cable Company of Kentucky,* Ky., 487 S. W. 2d 283 (1972). We conclude CATV is in fact a public utility within contemplation of the easements in question. A public utility is defined in Black's Law Dictionary (5th Ed.) as follows:

> PUBLIC UTILITY. . . . . Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is which is not limited or restricted to any particular class of the community. [Citations omitted.] The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public.
>
> . . . .

We do not find the CATV industry is deprived of its status simply because utility regulatory agencies of the federal and state governments have, in some way, declined to regulate. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040. We find it has long been a policy in this state that the type of easement in question is not limited to a particular method of use, but are susceptible to uses of contemporary technology. *See Cumberland Tel. & Tel. Co.* v. *Avritt,* 120 Ky. 34, 85 S. W. 204 (1905). We do not discern a valid

distinction between the apportionment of an easement to accommodate new technology and apportionment to accommodate a new and different innovation conforming to the definition of a utility and adapted to the ordinary ends of same. Indeed, it seems utility easements in the nature of those at hand have as their purpose the accommodation of all similar utilities. It cannot reasonably be assumed that a subdivision development would dedicate land to utility use with a limitation upon the type of service to be rendered. In this regard, we believe the identification of utilities, such as electric and telephone, was not intended to exclude those utilities requiring compatible installations such as CATV. Generally, we think it is not the function of the utility, but rather the physical nature of its installations which determines whether it conforms to the easement grant. The fact is, the apportioned use of the easements by the CATV companies places no additional burdens upon the appellants as owners of the servient estates. In absence of additional servitude, there can be, of course, no trespass.

Other jurisdictions which have addressed the issue have reached a similar result. *See Salvaty* v. *Falcon Cable Tel.*, — Cal. App. 3d Supp. —, 212 Cal. Rptr. 31 (Cal. App., 2 Dist. 1985); *White* v. *City of Ann Arbor,* 406 Mich. 554, 281 N.W. 2d 283 (1979); *Staminski* v. *Rimeo,* 62 Misc. 2d 1051, 310 N.Y.S. 2d 169 (1970); *Clark* v. *El Paso Cablevision, Inc.,* 475 S.W. 2d 575 (Tex. Civ. App. 1971). Appellants' heavy reliance upon *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) is misplaced. In *Loretto,* the State of New York had passed a statute which dictated that a landlord must permit cable television companies to install cable facilities upon his property. The landlord was to be compensated at a sum fixed by a state commission. The case did not involve an interpretation of easement law. The Court concluded that the state authorization of the installa-

tion of cable equipment in the manner prescribed constituted an unauthorized taking of property within the meaning of the fifth amendment. Therefore, the statute was held void.

Finally, upon careful analysis of the myriad facts and details contained in the record before us, we must conclude that the apportioned use of the traditional utility easements at hand lies not only within the direct scope and purpose of the easement, but is well supported by authority as to the manner and use of easements. *See generally,* 25 Am. Jur. 2d *Easements and Licenses,* § 72 et seq. (1966).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

Attorney for Appellants:

NICHOLAS W. CARLIN
911 Kentucky Home Life Building
Louisville, Kentucky 40202

Attorneys for Appellee/Times Mirror Cable Television of Louisville, Inc.:

DONALD H. BALLEISEN
JOHN E. SELENT
HOLLAND N. McTYEIRE V
GREENEBAUM, DOLL & McDONALD
3300 First National Tower
Louisville, Kentucky 40202

Attorneys for Appellee/Storer Communications of Jefferson County, Inc.:

LAURENCE J. ZIELKE
MICHAEL W. LOWE
PEDLEY, ROSS, ZIELKE & GORDINIER
1705 Meidinger Tower
Louisville, Kentucky 40202

Attorneys for Appellee/Louisville Gas and Electric Company:

JOHN W. BILBY
KENDRICK R. RIGGS
MIDDLETON & REUTLINER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202

Attorney for Appellee/South Central Bell Telephone Company:

JAMES G. HARRALSON
P.O. Box 32410
Louisville, Kentucky 40232

APPENDIX C

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS,
ROBERT KLEIN, TERESA KLEIN,
RICHARD RECEVEUR, PAMELA RECEVEUR,
MCKINLEY THURMAN, and WILMA THURMAN - *Movants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

MEMORANDUM OPINION OF THE COURT AFFIRMING

The residential property of each of the movants is encumbered by dedication on the subdivision plats or by deeds of dedication with easements for public utility purposes or for electric and telephone service. The respondents, Louisville Gas and Electric Company and South Central Bell Telephone Company have used these easements for the purpose of installing and maintaining electric and tele-

phone service to customers. These utility companies have permitted the respondents, Times Mirror Cable Television of Louisville, Inc. and Storer Communications of Jefferson County, Inc. to install and maintain an aerial coaxial television cable upon utility poles within the confines of the easements.

There is presently extending across the real property owned by each of the movants upon utility poles within the confines of the easements an aerial coaxial television cable. Each of the movants subscribed to the television cable service, signed an agreement with the cable companies granting their employees access to the property to install and service cable equipment, allowed the cable to remain in place without objection for a substantial period of time, and permitted the installation of a drop line across their property to connect their residences to the coaxial cable.

Each of the movants contend that the easement upon their property was granted for electric and telephone service or for public utility purposes and that the coaxial television cable does not qualify as a beneficiary under the terms of the easement. They contend, therefore, that the television cable constitutes a continuing trespass upon their private property for which they are entitled to damages.

Summary judgment was granted by the trial court to each of the respondents on the ground that the issue was moot as to the movants Michels, and that there was no trespass with respect to the other movants because they impliedly consented to the installation and maintenance of the cable.

The Court of Appeals affirmed the judgment of the trial court, but for a different reason than that given by the trial court, and expressed no opinion on the rationale for the judgment given by the trial court. The Court of Appeals held that the particular easements in question were susceptible to apportionment to television cable usage, al-

though the instruments creating the easement contained no express language permitting use by television cables.

This court likewise affirms the judgment. We decline, however, to review the question of the apportionability of the easements involved in this case.

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. *Restatement of the Law,* Torts 2d, § 329.

Habitual or customary use of property for a particular purpose, without objection from the owner or occupant, may give rise to an implication of consent to such use to the extent that the users have the status of licensees, where such habitual use has existed to the knowledge of the owner and has been accepted or acquiesced in by him. *Bradford* v. *Clifton,* Ky., 379 S. W. 2d 249 (1964).

Consent may be manifested by silence or inaction, and even when there is in fact no consent, the words or actions or inactions of an owner or occupant may, under some circumstances, manifest an apparent consent such as will justify reliance on the apparent consent. *Restatement of the Law,* Torts 2d, § 892, Comments (a) and (c).

We think it is clear that the movants had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

There are circumstances in which consent becomes irrevocable. *Restatement (Second) Torts,* § 892A(5) (1979). We hold that the general principles of estoppel apply here

and that movants are now estopped to contest respondents' use of the easement.

Because the issues in this case can be decided on the consent of the movants, it is unnecessary to discuss the broader question of the apportionability of the easement to cable television usage.

We find no error in the other matters asserted by movants.

The judgment is affirmed.

Stephens, C.J.; Gant; Stephenson; and Lambert, J.J. concur.

Leibson, J., concurs by separate attached opinion. Wintersheimer, J., dissents by separate attached opinion. Vance, J., not sitting.

Attorney for Movants:

NICHOLAS W. CARLIN
911 Kentucky Home Life Building
Louisville, KY 40202

Attorneys for Respondents:

MICHAEL W. LOWE
LAURENCE J. ZIELKE
450 S. 3rd Street, 5th Floor
Louisville, KY 40202

JOHN BILBY
2500 Brown & Williamson Tower
Louisville, KY 40202

JAMES HARRALSON
P.O. Box 32410
Louisville, KY 40232

MARVIN J. HIRN
JOHN E. SELENT
HOLLAND McTYEIRE V
3300 First National Tower
Louisville, KY 40202

SUPREME COURT OF KENTUCKY

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS,
ROBERT KLEIN, TERESA KLEIN,
RICHARD RECEVEUR, PAMELA RECEVEUR,
MCKINLEY THURMAN, and WILMA THURMAN - *Movants*

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

CONCURRING OPINION BY JUSTICE LEIBSON

I concur in results only.

If there were a continuing trespass, I would have some difficulty with the concept of estoppel.

However, I agree with the Court of Appeals that CATV is in fact a public utility within the contemplation of the easements in question, and that the CATV industry is not deprived of its status simply because utility regulatory agencies of the federal and state governments have declined to regulate it. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040.

In each of the cases presently involved, the existing public utility easement was sufficient to permit apportionment to accommodate new technology. The apportioned use of the easements by the CATV companies places upon the appellants as owners of the servient estates no additional burdens which should be considered beyond the contemplation of the easements in question.

SUPREME COURT OF KENTUCKY

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS,
ROBERT KLEIN, TERESA KLEIN,
RICHARD RECEVEUR, PAMELA RECEVEUR,
MCKINLEY THURMAN and WILMA THURMAN - *Appellants*

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS AND ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE CO. - - *Appellees*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent.

It is my view that informed consent is a necessary element of the doctrine of equitable estoppel. In my opinion, a person will not be estopped by his acts unless he understands his rights or actively participates or silently acquiesces in conditions operating to deprive him of his rights. Consent, when given, must be with full knowledge of the facts and rights affected. *See Trimble* v. *King*, 131 Ky. 1, 114 S. W. 317 (1908).

Waiver exists only where a party with full knowledge of the material facts does or forbears to do something inconsistent with that right and indicates that knowledge of the existence of the right is a prerequisite to such relinquishment. No one can waive a right which he does not know. *Harris Bros. Construction Co.* v. *Crider,* Ky., 497 S. W. 2d 731 (1973).

The party asserting estoppel must be excusably ignorant of the true facts and change his position to his detriment in reliance on the words or conduct of the other party. *See City of Georgetown* v. *Mulberry,* Ky., 485 S. W. 2d 503 (1972). That case indicates that where there is a duty to speak or act, silence and inaction are factors to be considered. The cable companies had a duty to seek permission from the property owners and their predecessors. It is not clear that any reason exists for them to ignore that duty.

Estoppel was developed to protect rights and not to reward wrongdoers, even if the wrongdoers are innocent of evil intent. *Sueskind* v. *Michael Hardware,* 228 Ky. 780, 15 S. W. 2d 529 (1929). The cable companies had superior knowledge of their legal obligations and duties to obtain permission for use of the easements. They had a duty to disclose to the property owners, and they knew it, as demonstrated in the license agreements between LG&E and Bell Telephone. It would appear that they willfully failed to disclose or seek permission or easement rights from the property owners.

It appears that both cable companies did not change their positions or any of their operating procedures throughout the Louisville and Jefferson County area. Objection by other owners never caused the companies to clarify their legal responsibilities to anyone. It seems unlikely that objections by these landowners would have changed the companies' policies and approach to installation.

In addition in this case, the Public Service Commission, along with LG&E and Bell Telephone, allowed the cable companies to enter licensing agreements with the utility companies for the use of their poles only with the requirement that the cable companies would obtain any permission or easements necessary from landowners. The cable companies entered on the property knowing that they had acquired a right to use the utility poles only and did not have the authority without permission to use the easement. They should not be able to now claim protection by virtue of estoppel.

The argument that because the property owner subscribes to cable TV he has no right to object to the trespass by the cable companies is without merit. Most property owners desire electricity more than they desire cable, but it is widely recognized that electric utilities must obtain either easement rights by condemnation or permission from the property owners involved. In that instance there is permission granted and if agreed, a payment for the easement right by the electric company to the landowner and continuing monthly payments by the landowner to the utility for electric services. This is an orderly, proper and commonly understood practice. The same should apply here. The landowner was not consulted by either the telephone utility or the cable company about his right to refuse to permit a cable guywire on his property. The license agreement required the cable company to obtain an appropriate easement but that licensed document was not published. Consequently the telephone utility had superior knowledge and a duty to disclose this information to the property owners. This duty arose from its easement.

The guywire on the property was visible, but the legal obligations and weaknesses of the cable company were not. The failure of the telephone company to disclose to the public, including the property owners, his right to refuse

or to permit the guywire and any other cable distribution equipment could be considered to be fraudulent concealment and if that is the case, it negates the defenses of consent, estoppel and waiver.

Reliance on *Bradford* v. *Clifton*, Ky., 379 S. W. 2d 249 (1964) is misplaced. The facts in *Bradford, supra,* are not comparable and the case does not hold that one who has consent for a prior use has consent for new uses. It says only that habitual or customary use of property for a particular purpose without objection from the owner or occupant may give rise to an implication of consent to such use. That does not extend to new uses and new users.

Summary judgment as granted by the trial court is not appropriate in this situation. I would reverse both the Court of Appeals and the trial court.